

2253

INCOMPATIBLE OFFICE — MEMBER, BOARD OF HEALTH,  
GENERAL HEALTH DISTRICT—JUSTICE OF PEACE.

## SYLLABUS:

The offices of member of the board of health of a general health district and justice of the peace are incompatible.

Columbus, Ohio, January 26, 1953

Hon. Harold D. Spears, Prosecuting Attorney  
Lawrence County, Ironton, Ohio

Dear Sir:

I have before me a request from your office for my opinion as to whether a member of the board of health of a general health district may also serve as a justice of the peace.

I know of no statutes which specifically forbid the holding of these two offices concurrently. The answer to your question, therefore, must be found in a determination as to whether, under the rules of the common law, such offices are incompatible.

The common law rule of incompatibility is well stated in 42 American Jurisprudence, 936, as follows:

“\* \* \* They are generally considered incompatible where such duties and functions are inherently inconsistent and repug-

nant so that, because of the contrarity and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy rendered it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices. \* \* \*

This common law rule of incompatibility has long been recognized in this state. *State, ex rel. Louthan v. Taylor*, 12 Ohio St., 130; *State, ex rel. Attorney General v. Gebert*, 12 O. C. C. (N. S.) 274; 24 Ohio Jurisprudence, 276; 32 Ohio Jurisprudence, 906 to 911.

General health districts are created pursuant to the provisions of Section 1261-16, et seq., General Code. Section 1261-30, General Code, confers upon such health districts all of the powers and duties "imposed by law upon the boards of health of a municipality." Thus, such health districts are authorized by Section 4413, General Code, to adopt orders and regulations for the prevention or restriction of disease and the prevention, abatement or suppression of nuisances. By the terms of Section 4414, General Code, the violation of such orders or regulations is a misdemeanor punishable by fine or imprisonment. Section 4416, General Code, provides that such prosecutions may be instituted before a justice of the peace within the county. By the terms of Section 1261-19, General Code, the district board of health appoints as its executive officer a health commissioner who is charged with the enforcement also of the sanitary laws and regulations in the district. Where such prosecution would be instituted before a justice of the peace who was a member of the board adopting the order sought to be enforced, it would clearly appear that the duty of such person, as a member of the board of health, would be inconsistent with his duty as a justice of the peace.

One of the basic tenets of our judicial system for protecting the rights of one accused of some crime is the right to a fair and impartial tribunal. To allow the same person, either individually, or as a member of the board

which initiates the prosecution, to sit as the arbitor on the question of guilt is clearly contrary to our democratic principles.

While it might be argued that in such case the defendant would be protected by his right to file an affidavit of prejudice against the justice of the peace should the justice assert the right to try such case, I believe that such argument is answered by the language of 42 American Jurisprudence, referred to above, that "The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices."

A somewhat similar question was considered by me in Opinion No. 811, Opinions of the Attorney General for 1941, page 586, wherein I expressed the opinion that offices of the justice of the peace and safety director of a city were incompatible.

In specific answer to your question, it is my opinion that the offices of member of the board of health of a general health district and justice of the peace are incompatible.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General